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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 157

AMERICAN EXPORT LINES, INC.,
Petitioner,

v.

HOWARD ALI AMMAR,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CITATIONS

	PAGE
CASES:	
Bertrand v. *Southern Pacific Co.*, 282 F. 2d 569, 572 (9 Cir. 1960)	3
Bertrand v. *Southern Pacific Co.*, 365 U. S. 816 (1961) supra	4
Brigham v. *Southern Pacific Co.*, 390 P. 2d 669 —— Ore. —— (1964)	3
Gallick v. *Baltimore & Ohio R. R. Co.*, 372 U. S. 108 (1963)	3
Rogers v. *Missouri Pacific R. R. Co.*, 352 U. S. 500 (1947)	2
Sullivan v. *B. & A. Construction Co.*, 307 N. Y. 161 (1954)	6
MISCELLANEOUS:	
Clark, New York Law of Damages (1925) § 113	5
Harper & James, Law of Torts (1956) Vol. II §§ 2210 p. 1231-32, 25.4 p. 1307	5
McCormick, On Damages (1935) § 33	5
Prosser, Law of Torts (2 Ed. 1955 p. 287)	5
Restatement of Torts, Vol. IV, § 918	5

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PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of October 12, 1964, denying the petition for writ of certiorari U. S. , and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case, as prayed for in the petition filed June 6, 1964, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. At the time of this Court's order of October 12, 1964, there were not only conflicting decisions as to question #1 (Pet. p. 2), but the opinion below set forth a novel rule of Maritime Law not only in conflict with all of the major text writers (Pet. p. 10), but also without judicial

authority as to question #2 (Pet. p. 2, 10a). Furthermore, in reviewing the actions taken by the Court during October, petitioner notes a sharp reduction in the Court's acceptance of cases for review particularly those not involving Civil Rights or criminal matters. While the petitioner recognizes the overwhelming burden thrust on the Court by the Civil Rights struggle, of which we are all so acutely aware, recently rendered even more pressing by the new Civil Rights legislation, petitioner respectfully submits that the entire Judiciary is also concerned with the volume of Jones Act and F. E. L. A. litigation. The decision below at the very least portends confusion and, indeed, at most encourages fraud and injustice.

That this is important is stressed by the fact that increased costs will result in the laying up this winter of three of the seven American flag transatlantic passenger ships (America, Exeter and Excalibur).

At the heart of petitioner's argument in the case at bar is the fact that the case of *Rogers* v. *Missouri Pacific R. R. Co.*, 352 U. S. 500 (1957) does not foreclose in a Jones Act case the application of causation analysis to limit liability for remote damages, as was held in the opinion below (Pet. p. 8a). Nor does *Rogers* require that the question of foreseeability or efficient intervening cause be withdrawn from the jury by the Trial Judge, again as held in the opinion below (Pet. p. 7a).*

*Notwithstanding the assertion to the contrary appearing in the opinion below (Pet. p. 7a) that the District Court concluded that the employee's negligence was not an intervening efficient cause breaking the chain of proximate causation, there was no such conclusion on the part of the District Court and this contention is manifest by the fact that the District Court did, in fact, include in its instructions on unseaworthiness the concepts of forseeability and efficient intervening cause, which instructions would have been ambiguous, confusing and completely superfluous if such a conclusion had been reached by the Trial Court (Pet. p. 7a 1st quoted paragraph).

Obviously the *Rogers* decision not only permits but requires causation analysis. While if defendant's negligence played any part, even the slightest, in producing plaintiff's injury, liability will follow, the door to liability can nonetheless only be opened by negligence. Foreseeability, of course, remains an essential element of negligence and this Court recently reaffirmed this axiomatic principle in the case of *Gallick* v. *Baltimore & Ohio R. R. Co.*, 372 U. S. 108 (1963).

As might well be expected Trial Courts have had difficulty in attempting to frame jury instructions following the holding of the *Rogers case*.

For example, note two recent conflicting decisions. In *Bertrand* v. *Southern Pacific Co.*, 282 F. 2d 569, 572 (9 Cir. 1960), the Trial Court was affirmed after having *rejected* plaintiff's requested instructions paraphrasing in part the language of the *Rogers* case. In an attempt to explain the import of the *Rogers* case, the Court stated:

> "The Court in that case, however, was not speaking of the 'test of liability of the railroad carrier' (the language used in the proposed instruction) 'but the test of a jury case' ". Ibid. at 573.

Further, the Supreme Court of Oregon as recently as March 4, 1964, impliedly conceded that it was confused with respect to the import of the *Rogers* case. *Brigham* v. *Southern Pacific Co.*, 390 P. 2d 669. This F. E. L. A. case was submitted to a jury, the defendant railroad prevailed and the employee appealed. The Trial Court gave the jury the traditional instruction with respect to proximate cause, including instructions on foreseeability and efficient intervening cause and the basis of plaintiff's appeal was his exception to such instruction. The Appellate Court in affirming the judgment below actually held that plaintiff's excep-

tion was inadequate to focus the Trial Court's attention on the troublesome issue presented in the case. However, the Court, in stating that, since the decision in *Rogers*, it appears that the traditional instruction is not permissible (citing the case at bar among others), also said:

> "It is clear that in a Federal Employers' Liability Act case submitted to the jury an instruction must be given that requires a finding of a causal relation between the acts of alleged negligence and of plaintiff's injury in order to establish a defendant's liability. The *cases do not make it clear as to what that instruction should say.*" Ibid. at 670 [Emphasis added.]

It is pertinent, if not controlling, to point out that certiorari was denied in the case of *Bertrand* v. *Southern Pacific Co.*, 365 U. S. 816 (1961) *supra*, which is difficult to reconcile with the Court's order of October 12, 1964 denying certiorari in the instant case.

2. The remaining question, which requires review, is the approval in the opinion below of the Trial Court's plain error, as contended by both parties on appeal, in charging the jury in terms of comparative negligence with respect to the seaman's subsequent shoreside accident. The only possible rationale for the Court's forging of this unique concept lies in the emotional thrust of plaintiff's case, which is hardly productive of the consistency and predictability required of our system of jurisprudence. In the opinion below, the Court scuttled respondent's cross appeal with the statement that he had not properly preserved this plain error by an objection to the Trial Court instructions.

The Court below did not even attempt to meet petitioner's argument that the doctrine of comparative negligence was not the appropriate vehicle for determining the rights of the

parties with respect to the damages flowing from the shoreside accident. However, the Court below did hold that:

> "[T]he liberal policies of the Jones Act are best served by the apportionment of consequential damages on the basis of fault rather than by the all or nothing rule of liability . . .";

despite the fact that during its 30 odd years of existence the statute has never been so construed. Petitioner contends that a seaman suing under the Jones Act has no greater rights than any other citizen of the United States with respect to the damages flowing from a subsequent shoreside accident. Obviously, the rights of the parties with respect to the damages flowing from the subsequent shoreside accident should have been determined by the jury, but only after the jury had been instructed in accordance with the respondent's expressly denied requested instruction #14, to wit:

> "If you find that under the circumstances, the riding of the motorcycle was negligent, then you must find for defendant with respect to the damages flowing from the second accident."

The foregoing instruction succinctly recites the essence of the universally recognized rule of law that a person convalescing from an injury has a duty to exercise due care to avoid further injury and failing to do so he must bear the loss. Harper & James, *Law of Torts* (1956) Vol. II §§ 22.10 p. 1231-32, 25.4 p. 1307. *Restatement of Torts*, Vol. IV, § 918; Prosser, *Law of Torts* (2 Ed. 1955) p. 287; McCormick *On Damages* (1935) § 33; Clark *New York Law of Damages*, (1925) § 113. The need and reason for this time tested legal principle leave no room for fraud and place the duty to exercise due care on the person best able to avoid subsequent injury.

Clearly the statute enunciating the doctrine of contributory negligence stating as it does that the contributory negligence of the employee shall not bar a recovery was enacted to circumvent the common law "all or nothing rule" of contributory negligence in the case of an on-the-job accident. The statute was meant to set the seaman and the railroad worker apart only with respect to on-the-job accidents and to compensate them for injuries sustained on-the-job. But this extraordinary remedy was not intended to set the seaman and the railroad worker apart from other workers, who were then and are now precluded from recovering remote damages when they are subsequently injured due to their own failure to exercise due care while recovering from an industrial accident. *See Sullivan v. B. & A. Construction Co.*, 307 N. Y. 161 (1954).

The administration of the Jones Act and the F. E. L. A. requires that the foregoing questions be reviewed in order to clear up the confusion aboard with respect to the place of causation analysis if any, in this important and overburdening body of federal litigation.

3. That this case is *sui generis* on the particular facts is no reason to deny certiorari. It is the questionable cases that get tried. Any definition of the limits to be observed in allowing consequential damages will be most helpful in clearing calendars. Jury charges will be clarified but more important for efficient judicial administration, cases will be more readily evaluated, which in turn will facilitate pre-trial disposition. Considering the volume of Federal Employees Liability Act legislation, any definitive decision will be helpful in reducing the present calendar log jam and in facilitating trials of other cases. Justice delayed is justice denied.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

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HOLLIS M. WALKER,
Of Counsel

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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